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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 **MARCO MARROQUIN,**

Petitioner,

17 v.

18 **BEN CURRY,**

19 Respondent.
20

C-07-6098 MJJ (PR)

**RESPONDENT'S NOTICE OF
MOTION AND MOTION TO
DISMISS; MEMORANDUM OF
POINTS AND AUTHORITIES**

Judge: The Honorable Martin Jenkins

21 TO PETITIONER MARCO MARROQUIN, IN PRO PER,

22 PLEASE TAKE NOTICE that Respondent Ben Curry, Warden at the Correctional Training
23 Facility, moves this Court to dismiss the Petition for Writ of Habeas Corpus pursuant to 28
24 U.S.C. § 2254 (2000) and Rules 2 and 4 of the Rules Governing § 2254 Cases in the United
25 States District Courts, on the ground that Marroquin did not exhaust his state court remedies for
26 all of his claims. This motion is based on the notice and motion, the memorandum of points and
27 authorities and exhibit, the petition for writ of habeas corpus, the court records in this action, and
28 other such matters properly before this Court.

Respt's Not. of Mot. & Mot. to Dismiss; Mem. of P. & A.

Marroquin v. Curry
Case No. C-07-6098 MJJ (PR)

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Marroquin, an inmate at the Correctional Training Facility, represents himself in this habeas
4 corpus action. Marroquin contends that the Board of Parole Hearings unconstitutionally found
5 him unsuitable for parole at a 2006 subsequent parole consideration hearing. This Court found
6 Marroquin's six claims sufficient to require a response: (1) that he has a liberty interest protected
7 by due process in being found suitable for parole; (2) that the Board violated his due process
8 rights in applying regulations to override statute; (3) that the Board violated his equal protection
9 rights by failing to consider setting his term and failing to fix a primary term; (4) that the Board's
10 denial based on the commitment offense violated his due process rights; (5) that the Board
11 violated his due process rights by denying parole based on a predetermined outcome; and (6) that
12 the Board violated his due process rights by holding his parole suitability hearing when he is a
13 foreign national subject to deportation. (Order to Show Cause at 2.) Marroquin failed to exhaust
14 all but one of these claim in his California Supreme Court petition for review. Thus, this Court
15 should dismiss Marroquin's mixed petition.

16 **ARGUMENT**

17 **THIS PETITION SHOULD BE DISMISSED BECAUSE IT CONTAINS**
18 **BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS.**

19 This Court should dismiss Marroquin's petition as mixed because Marroquin failed to
20 exhaust five of his six claims by presenting them in his California Supreme Court petition for
21 review. A federal habeas petitioner must exhaust his available state court remedies before a
22 federal court may grant his petition. 28 U.S.C. § 2254(b)(1)(A). If one or more claims in the
23 federal petition have not been exhausted, the district court must dismiss the petition. *Pliler v.*
24 *Ford*, 542 U.S. 225, 227 (2004) (citing *Rose v. Lundy*, 455 U.S. 509, 510 (1982)). This rule
25 provides the state courts a full and fair opportunity to resolve federal constitutional claims before
26 they are presented to the federal court, thus "protect[ing] the state courts' role in the enforcement
27 of federal law" *Rose*, 455 U.S. at 518 (citation omitted).

28 It is the petitioner's burden to prove that he has exhausted his state court remedies before

1 filing his federal habeas petition. *See Williams v. Craven*, 460 F.2d 1253, 1254 (9th Cir. 1972)
 2 (per curiam). “A petitioner has satisfied the exhaustion requirement if: (1) he has ‘fairly
 3 presented’ his federal claim to the highest state court with jurisdiction to consider it . . . or (2) he
 4 demonstrates that no state remedy remains available.” *Johnson v. Zenon*, 88 F.3d 828, 829 (9th
 5 Cir. 1996) (citations omitted). In California, a petitioner exhausts his federal claim by fairly
 6 presenting it to the California Supreme Court. *See Kim v. Villalobos*, 799 F.2d 1317, 1318 (9th
 7 Cir. 1986). Lastly, a petitioner has not exhausted the available state court remedies “if he has the
 8 right under the law of the State to raise, by any available procedure, the question presented.” 28
 9 U.S.C. § 2254(c).

10 Here, the petition should be dismissed because Marroquin failed to meet the state court
 11 exhaustion requirement for all of his federal claims. Firstly, Marroquin fairly presented only his
 12 fourth federal claim – that the Board violated his due process rights by relying on the
 13 commitment offense to deny parole – to the California Supreme Court. (*See* Ex. 1, Pet. for
 14 Review, at 3.) In the petition for review that Marroquin filed with the California Supreme Court,
 15 he does not assert any of his other federal claims, much less set forth any related legal arguments.
 16 (*See id.* at 1-6.)

17 Secondly, Marroquin does not demonstrate that no state remedy is available for his
 18 unexhausted federal claims. In fact, Marroquin is not precluded from exhausting his state court
 19 remedies because the California Supreme Court has original jurisdiction to review petitions for
 20 writ of habeas corpus. Cal. Const. art. VI, § 10. Thus, Marroquin can still file a habeas petition
 21 in the California Supreme Court alleging the unexhausted claims. Accordingly, Marroquin has
 22 not “reach[ed] the point where he has no state remedies available to him . . .” and the petition
 23 should be dismissed. *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (citation
 24 omitted).

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CONCLUSION

Marroquin did not fairly present all of his claim to the California Supreme Court before filing this federal petition; therefore, he failed to meet his burden of proof regarding state court exhaustion. Thus, this Court should dismiss Marroquin's mixed petition.

Dated: March 18, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Marco Marroquin v. Ben Curry*

No.: U. S. C. C., N. D., San Francisco Division, C-07-6098 MJJ (PR)

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 18, 2008, I served the attached

**RESPONDENT'S NOTICE OF MOTION AND MOTION TO DISMISS;
MEMORANDUM OF POINTS AND AUTHORITIES with Exhibit 1**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Marco Marroquin, H-62380
Correctional Training Facility
P.O. Box 689
Soledad, CA 93960-0689
In Pro Per**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 18, 2008**, at San Francisco, California.

J. Baker

Declarant



Signature